No. 12902

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, LIBELANT-APPELLANT

v.

MATSON NAVIGATION COMPANY, A CORPORATION; W. R. ECKHART, TUG LOUIE III, HER BOILERS, ENGINES, TACKLE, APPAREL, FURNITURE, ETC., AND WESTPORT TOWBOAT COMPANY, A CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

HOLMES BALDRIDGE,
Assistant Attorney General.
HENRY L. HESS,
United States Attorney.
LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General.
Attorneys for the United States.

INDEX

CITATIONS

Cases:

Cases—Continued

Statutes:

Miscellaneous:

In the United States Court of Appeals for the Ninth Circuit

No. 12902

UNITED STATES OF AMERICA, APPELLANT

v.

MATSON NAVIGATION COMPANY, A CORPORATION; W. R. ECKHART, TUG LOUIE III, HER BOILERS, ENGINES, TACKLE, APPAREL, FURNITURE, ETC., AND WESTPORT TOWBOAT COMPANY, A CORPORATION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

JURISDICTION

This Court's jurisdiction rests upon 28 U.S.C. 1291 by reason of a notice of appeal, filed January 18, 1951 (R. 32) from an order entered October 27, 1950 (R. 28-30), which dismissed the Government's libel in all respects.

The jurisdiction of the district court rests upon 28 U.S.C. 1333 by reason of a libel in admiralty in two counts (the *first* for damages under the general maritime law, the *second* for penalties under the Rivers and

Harbors Act), filed May 22, 1950 (R. 3-15) to recover damages to various aids to navigation and equipment caused on December 21, 1946 by certain vessels operated and controlled by respondents.

QUESTIONS

A Government aid to navigation in the form of a dike attached to the shore of the Columbia River was damaged on December 21, 1946, prior to the enactment of the Admiralty Extension Act of June 19, 1948 (46 U.S.C. 740), as a result of the navigation of certain vessels operated and controlled by respondents. After the enactment of the Admiralty Extension Act, the United States on May 22, 1950 brought a libel in Admiralty to recover *inter alia* for the damage to the dike. The libel was in two counts, the first for damages under the general maritime law, the second for penalties under the Rivers and Harbors Act of March 3, 1899. The Court below dismissed the libel for want of Admiralty jurisdiction. The questions are—

1. Whether the Admiralty Extension Act, 1948, directs the district courts to exercise admiralty jurisdiction over claims arising out of damage by vessels to shore structures occurring prior to its enactment.

2. Whether claims arising out of damage by a vessel to an aid to navigation attached to the shore are within the constitutional grant of admiralty jurisdiction to the district courts.

STATUTE

The Admiralty Extension Act of June 19, 1948 (62 Stat. 496; 46 U.S.C. 740) provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in*

Congress assembled, That the admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought *in rem* or *in personam* according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: * * *.

STATEMENT

All of the parties consented to a trial by the district court limited solely to determining the jurisdiction of the district court, sitting in admiralty, to entertain the Government's claim for injury to Dike No. 67-1 in the Columbia River by certain vessels operated and controlled by respondents: *First,* as set forth in its first cause of action, for damages by reason of the alleged negligent navigation of the vessels; and, *second,* as set forth in its second cause of action, for penalties under the Rivers and Harbors Act, 1899, by reason of the alleged status of the dike as an aid to navigation within that Act (R. 26).

With respect to the first cause of action for negligent navigation, the trial judge held that, aside from the Admiralty Extension Act of June 19, 1948, the court sitting in admiralty had no jurisdiction of damage to a shore structure and that the Extension Act had no application to a suit brought after its enactment to recover for an accident which occurred prior to its enactment. With respect the second cause of action, for penalties for violation of the Rivers and Harbors Act, 1899, the trial judge equally held that the court sitting in admir-

alty had no jurisdiction (R. 27). An appropriate order of dismissal was entered (R. 28-30) and this appeal followed.

ARGUMENT

Introduction

Admiralty courts, while not courts of equity, proceed upon equitable principles and like equity courts are courts of exceptional, not of general, jurisdiction, exercising a sound discretion in respect of exercising their special jurisdiction. There is thus a clear distinction between the term "jurisdiction" in its strict meaning as relating, on the one hand, to the existence of power in the court to hear and determine, and its use as relating, on the other, to those cases or occasions when this power to hear and determine will in fact be exercised by the court in its wise discretion. The fact that the United States Courts sitting in admiralty have ordinarily regarded cases of damages caused by a vessel to the shore as not a necessary and proper occasion for the routine exercise of admiralty jurisdiction does not conclusively establish the absence of judicial power to hear and determine such cases much less the absence of the constitutional power of Congress to direct the courts to exercise that admiralty power to its fullest extent. Thus it is familiar that when the court once takes admiralty jurisdiction it has power to deal with all connected matters although they arose on shore.

That Congress intended in the Admiralty Extension Act, 1948, to direct the courts that thereafter they should no longer withhold the exercise of their powers to hear and determine in admiralty which it regarded

them as already possessing under the Constitution and the Judiciary Acts, is plain from the very language of the reports of the Judiciary Committees of the House and Senate. Both Committees stated (1948 A.M.C. at 1505):

> Adoption of the bill will not create new causes of action. It merely directs the courts to exercise the admiralty and maritime jurisdiction of the United States already conferred by Article III, Section 2, of the Constitution and already authorized by the Judiciary Acts.

It follows that, like every command of Congress to the courts regarding matters of procedure and not of substantive right, it applies to every suit pending or filed after its enactment, regardless of the date of the occurrence which gave rise to it.

Nor is the Congressional command that henceforth the courts shall exercise their pre-existing admiralty powers in cases of damage by ship to shore a novelty. In the words of House and Senate Committees (1948 A.M.C. 1504):

> The bill will bring United States practice respecting maritime torts into accord with that followed by the British, who by a series of statutes, beginning in 1840, have restored admiralty jurisdiction in situations of this character and brought the British law into harmony with that of most European countries.

Indeed, as a matter of simple fact and history, nothing could appear more obvious than that damages wrongfully caused by a vessel to an aid to navigation, par-

ticularly as here structures situated on the shore, constitute in actual fact a maritime tort particularly appropriate for the exercise of the powers to hear and determine of an American no less than any other court of admiralty.

Had it not been for the conflicts between Lord Coke and the English admiralty judges and his issuance of prohibitions against their exercise of jurisdiction whenever maritime damage was within the body of a county so that a jury of the vicinage could be found, it may be doubted that any admiralty judge in either England or America would ever have been found to withhold the exercise of jurisdiction in a case so clearly maritime in fact. Certainly no other type of damage by shipping calls more strongly for the traditional admiralty relief, beginning with arrest of the ship *in rem,* than where a foreign vessel damages our shores and may otherwise sail away, leaving the injured claimant obliged to follow home its owner to a foreign land unless the admiralty will aid him. And so we find that both in England and in France, admiralty jurisdiction has long extended to damage done by a vessel to the shore. In France this has ever been the rule. In England it was the law before Lord Coke and a hundred years ago was restored again by statute.

In the United States the strictures of Lord Coke against admiralty jurisdiction of wrongs within the body of a county were early repudiated where damage between two vessels or between a vessel and those who served here, or were hurt aboard her, was concerned. So also where shore structures damaged a vessel; only

in respect of damage by a vessel to the shore has Lord Coke's hand still weighed upon us. But the Constitution did not import the dictates of Coke into our land. It gave the admiralty courts jurisdiction of every case reasonably regarded as maritime anywhere in the world without making one exception. "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction" (Art. III, Sec. 2). And, implementing the constitutional grant, the Judiciary Act of 1789, with equal broadness, conferred "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" (1 Stat. 76). Today the Judicial Code still gives jurisdiction of "Any civil case of admiralty or maritime jurisdiction" (28 U.S.C. 1333). The Admiralty Extension Act, 1948, has merely commanded the courts henceforth to exercise the broad general power thus conferred.

We submit that the congressional command is effective and valid according to its terms and that the court below erred in disobeying by refusing to exercise admiralty jurisdiction in the case now at bar.

I

The Admiralty Extension Act, 1948, Validly Directs the Courts to Exercise the Full Admiralty Jurisdiction Already Granted Them by the Judiciary Act of 1789 in Every Suit Already Pending or Filed After Its Enactment on June 19, 1948

The legislative history of the Admiralty Extension Act of June 19, 1948 (62 Stat. 496; 46 U.S.C. 740) makes it plain that it was intended by the Congress to be purely procedural in character and was therefore regarded as applicable to every suit pending or filed

after its enactment, even though the cause of action had arisen prior to its enactment and would not previously have been entertained under the prior self-denying decisions of the admiralty courts.

In commenting on the bill before its enactment by Congress, the Department of Justice in a letter to the Chairman of the House Judiciary Committee drew attention to this retroactive effect of the bill. It observed (1948 A.M.C. 1512):

> The bill would not create new causes of action but merely direct the courts to exercise the admiralty and maritime jurisdiction of the United States already conferred by Article III, Section 2, of the Constitution, and by the Judicial Code.

The probability of disputes, such as that in the case at bar, concerning this retroactive application of the proposed statute to causes where the damage antedated the act was expressly foreseen. Thus the Department of Justice recommended that the Act should not be made applicable to suits already brought but only to those subsequently filed. The Department's recommendation stated (1948 A.M.C. 1512)—

> In order to avoid conflict or uncertainty, it is suggested that the bill be amended to indicate that it is to apply only to suits instituted after its adoption.

But in favorably reporting the bill, the House and Senate Judiciary Committees rejected this suggestion of the Department of Justice since, as the committees pointed out, the causes of action involved were already in existence and within the courts' power and the sole

effect of the bill was a procedural change. Both Committee reports stated (1948 A.M.C. 1505):

> It merely specifically directs the courts to exercise the admiralty and maritime jurisdiction of the United States already conferred by Article III, Section 2, of the Constitution and already authorized by the Judiciary Acts.

Thus there can be no doubt of the Congressional purpose that admiralty procedure should apply not only to suits like the present, where the cause of action preceded the enactment of the Admiralty Extension Act, 1948, although the suit was filed afterwards, but also to suits already filed in admiralty prior to the enactment of the Admiralty Extension Act.

Nor can there be any question about the power of Congress to direct the courts henceforth to extend admiralty procedure to causes of action which pre-existed the enactment of the statute and to suits in admiralty already instituted prior thereto. Congress was fully informed of the decisions of the Supreme Court in *Jackson* v. *Steamboat Magnolia,* (1857) 20 How. 296, and *Propeller Genesee Chief* v. *Fitzhugh,* (1851) 12 How. 443, where it had been held that Congress might pass "a declaratory act reversing the decision" of the courts in prior cases as to the extent to which they would exercise their admiralty jurisdiction, but could not enlarge the jurisdiction itself as opposed to commanding the courts to extend its exercise. As pointed out in those cases, nothing in the Constitution or the Judiciary Act confines admiralty jurisdiction in any way. Both grant the courts power over "all cases of

admiralty and maritime jurisdiction''—a grant so broad that no new statutory words could possibly enlarge it.

That such mere procedural changes as are here involved always operate retroactively is elementary. As the Supreme Court recently observed of a similar procedural change in *Ex Parte Collett,* (1949) 337 U.S. 55, 71, the Extension Act ''is a remedial provision applicable to pending actions, and 'No one has a vested right in any given mode of procedure * * * ' '', citing *Crane* v. *Hahlo,* (1922) 258 U.S. 142, 147. So here it is not open to appellees to urge that they damaged the Government's dike in reliance upon their expectation that the courts would not exercise their admiralty jurisdiction over the offense. Cf. *Chase Securities Co.* v. *Donaldson,* (1945) 325 U.S. 304, 316. It does not render this rule as to procedural change inapplicable that one of its incidental consequences is, as in the case now at bar, to alter the priority and order of payment of claims. *Carpenter* v. *Wabash Railway Co.,* (1940) 309 U.S. 23, 27. In legal effect all the Extension Act has done is to direct the courts to afford added procedural remedies. As the court said in *Berkovitz* v. *Arbib and Houlberg,* (1921) 230 N. Y. 261, 130 N.E. 288, 290, ''All the statute has done is to make two remedies available where formerly there was none.''

Neither would it matter if the procedural change had been, contrary to our view, one affecting the actual jurisdiction itself and not merely the courts' discretion as to its exercise. It is so elementary that there are few cases on the point, but there can be no dispute that,

absent a clear expression of contrary intent, a statute conferring a new jurisdiction will operate to give jurisdiction over causes of action arising before the passage of the Act. *Larkin* v. *Saffrans,* (W.D. Tenn., 1883) 15 Fed. 147; *United Wall Paper Factories, Inc.* v. *Hodges,* (2d Cir., 1934) 79 F. 2d 243, 244; *Cobleigh* v. *Epping Brick Co.,* (D. N.H., 1949) 85 F. Supp. 862, 863.[1]

We submit, therefore, that unless the Admiralty Extension Act, 1948, is to be held unconstitutional in all respects, it applies not only to the present case but to every case either already pending or subsequently instituted.

II

The Rivers and Harbors Act, 1899, Created a Cause of Action Against the Vessel Itself Which Has Been Enforced and Enforceable in Admiralty under the Judiciary Act of 1789 for Many Years Prior to the Institution of the Present Suit

The majority rule in the federal courts has been established for many years that proceedings under the various Rivers and Harbors acts, like all other procedures for penalties and forfeitures against vessels for violation of the navigation laws, may be brought

---

[1] The serious question has always been not as to the *extension* but as to the *withdrawal* of pre-existing jurisdiction, but here again it is settled that, even though the case be on appeal when the statute is enacted, the statute, if it lacks special provision to the contrary, must be applied retroactively. *United States* v. *Kelly,* (9th Cir., 1899) 97 Fed. 460; *United States* v. *McCrory,* (5th Cir. 1899) 91 Fed. 295; *Fairchild* v. *United States,* (D. N.J., 1899) 91 Fed. 298. Thus in *Insurance Co.* v. *Richie,* (1866) 5 Wall. 541, 544, the court said: "It is clear, that where the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction. And it is equally clear, that where a jurisdiction, conferred by statute, is prohibited by a subsequent statute, the prohibition is, so far, a repeal of the statute conferring the jurisdiction." The converse, respecting extension of jurisdiction, follows *a fortiori.*

either in admiralty or at law at the choice of the Government. The Judiciary Act from the beginning provided for jurisdiction of all admiralty cases "including all seizures under laws of impost, navigation or trade of the United States where the seizures are made on waters which are navigable from the sea". This was early construed by Chief Justice Marshall in *The Betsey and Charlotte,* (1808) 4 Cranch. 443, to extend jurisdiction in respect of acts done on shore. In that case it was objected that the offense was committed on land, and thus without the admiralty jurisdiction, but the Chief Justice declared (p. 452): "It is the place of seizure, and not the place of committing the offense which decides the jurisdiction."

The admiralty jurisdiction for imposing such penalties for violation of the various harbor acts upon the vessel itself was, moreover, expressly upheld by the Supreme Court in *The Scow 6-S,* (1919) 250 U.S. 269, 272-273, where the Court said: "It treats the offending vessel as a guilty thing, upon the familiar principle of the maritime law, and permits a proceeding against her in any court of admiralty 'having jurisdiction thereof' —meaning any court within whose jurisdiction she may be found", and the Court concluded that admiralty jurisdiction was undoubted since, "if it be not a proceeding for enforcement of a penalty or forfeiture incurred under a law of the United States within the meaning of the 9th subdivision of § 24, Judicial Code, the Act of 1888 itself confers jurisdiction." The authorities are carefully reviewed and the existence of jurisdiction of cases under the 1899 Rivers and Harbors Act in admiralty as well as at law is upheld in *The*

Barbara Cates, (1936) 17 F. Supp. 241. A similar result had been earlier reached in *The Gansfjord,* (E.D. La., 1927) 17 F. 2d 613, 614, where, after alluding to *The Panoil,* (1925) 255 U.S. 433, 435, the court observed that but for the Rivers and Harbors Act jurisdiction would have been at law rather than in admiralty but that the navigation statute had brought the matter within the Judiciary Act.

The fact that in *The Gandsfjord* and other cases prior to the Admiralty Extension Act, 1948, it was the Government's usual practice in Rivers and Harbors Act cases to file two libels, one at law and the other in admiralty, in no wise detracts from the resultant double jurisdiction. As pointed out in *The Barbara Cates, supra* (at p. 244), the practical importance to the Government of whether the libel at law or the libel in admiralty, or both, are proceeded with is negligible. The usual practice of claimants has been to except to the libel at law on the ground that admiralty jurisdiction was exclusive and to the libel in admiralty on the ground that the exclusive jurisdiction was at law. The Government, as a matter of convenience, was thereby forced habitually to bring two libels. This is well illustrated in *The Gansfjord* litigation where both the admiralty and civil cases are reported and jurisdiction of the libel in admiralty is upheld in 17 F. 2d 613 and jurisdiction of the companion libel at law similarly upheld in 25 F. 2d 736.[2]

---

[2] Thus in both *The Gansfjord,* (5th Cir. 1929) 32 F. 2d 236, and *The Republic No. 2,* (S.D. Tex. 1946) 64 F. Supp. 373, the matter proceeded at law in accordance with the Government's usual policy, prior to the Extension Act, of treating the matter as immaterial. Moreover, the Government was successful on the merits and there could be no appeal. Cf. *The Dixie,* (S.D. Tex. 1941) 39 F. Supp.

In short, admiralty, as already pointed out in our introduction, is an exceptional jurisdiction the exercise of which is discretionary with the courts and the Government has always been of opinion that, while undoubted jurisdiction exists in admiralty, the courts were not, prior to the Admiralty Extension Act, abusing their discretion by refusing to exercise it where shore damage was involved. Thus Judge Knox summarized the matter as it stood before the 1948 Act when he said in *United States* v. *The Mount Parnes,* (S.D. N.Y) 1942 A.M.C. 223, 224 (not otherwise reported): "I believe that this court should not *exercise* its admiralty jurisdiction." (Emphasis supplied.) We submit, however, that Congress in the Admiralty Extension Act, 1948, has now for the first time commanded the courts to *exercise* in every case the full admiralty jurisdiction previously conferred by the Judiciary Acts and, unless the Admiralty Extension Act is to be held unconstitutional, it was the duty of the court below to comply in this case.

III

The Constitutional Grant of Admiralty Jurisdiction Extends to All Cases Maritime in Fact, Including Damages Caused by Vessels to Shore Structures

We believe that the constitutionality of the Admiralty Extension Act is unquestionable. In *De Lovio* v. *Boit,* (C. C. Mass., 1915) 7 Fed. Cas. No. 3,776, at p. 442, Justice Story pointed out that there are four possible historical interpretations of the constitutional grant of

---

395, previous proceedings, 30 F. Supp. 215, where no appeal was taken either at law or in admiralty from the attempt of the United States Attorney to bring libels for damage to a bridge as an "aid to navigation" under the Rivers and Harbors Act.

admiralty jurisdiction: (1) the restricted admiralty jurisdiction admitted in England at the time of the American Revolution; (2) the jurisdiction at the time of the emigration of the American colonists; (3) the admiralty jurisdiction exercised in the United States at the time of the American Revolution; (4) the ancient and original jurisdiction inherent in the admiralty of England corresponding to that of the continental admiralty courts. The latter, Story held to be the true interpretation. He thus refused to limit the constitutional grant of admiralty jurisdiction to the restraining statutes and judicial prohibitions of England.[3] He pointed out that the framers of the Constitution were fully aware of the English disputes and discussions respecting the extent of admiralty jurisdiction.[4] They

---

[3] See the provisions of 13 Rich. II, c. 5 (1389), "The admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea . . ." 15 Rich. II, c. 3 (1391), "Of all manner of contracts, pleas and quarrels, and all other things rising within the bodies of the countries . . . the admiral's courts shall have no . . . jurisdiction . . . but such shall be tried . . . by the laws of the land . . . except for death or maihem done in great ships in the main stream of great rivers beneath the bridges (points) of the same." And see 2 Hen. IV, c. 11 (1400), where a remedy was given him who was wrongfully pursued in the court of admiralty, with double damages allowed. Furthermore, through strained judicial constructions, admiralty was not allowed jurisdiction if the common law afforded a remedy, and consequently, English admiralty jurisdiction was stopped at the high-water mark. See Justice Story's elaborate discussion in *DeLovio* v. *Boit, supra,* esp. beginning pp. 421ff., 429ff.; *Waring* v. *Clarke,* 5 How. 441; Mears, The History of the Admiralty Jurisdiction, in 2 *Select Essays in Anglo-American Legal History,* p. 312, especially pp. 353, *et seq.;* Roscoe's Admiralty Practice (5th ed.), pp. 4-15; Marsden, Introduction, 2 *Select Pleas in the Court of Admiralty* (11 Selden Soc. Publ.); Marsden, Law and Custom of the Sea, Vol. 2, pp. vii-xxii. Compare Hoon, The Organization of the English Customs System 1696-1786, p. 276.

[4] Warren, *History of the American Bar,* (1913) 279, 4 Beveridge, *Life of John Marshall,* (1919) 119.

therefore had added to the word "admiralty," which of itself included the broader jurisdiction of the colonial vice-admiralty courts, the still larger term "maritime," which referred to all causes that were both civil and maritime, as a matter of fact, "The language of the Constitution would therefore," he concluded, "warrant a most liberal interpretation." He declared (p. 443):

> . . . it may not be unfit to hold that it had reference to that maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind.

And in *New England Marine Ins. Co.* v. *Dunham,* (1871) 11 Wall. 1, 24, the Supreme Court similarly declared:

> This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England but is to be interpreted by a more enlarged view of its essential nature and objects and with reference to analogous jurisdiction in other countries, con-

> stituting the maritime commercial world, as well as to that of England."

On the continent the historic jurisdiction extended to damage done by ships to shore structures. The French *Ordinance on the Marine of August 1681,* Liv. I, Title II, Arts. VI and VII,[5] for example expressly extends the jurisdiction to shore side matters. But even in England this had been the original extent of jurisdiction. In *The Blackheath,* (1904) 195 U.S. 361, 365, Mr. Justice Holmes reviewed the ancient jurisdiction of the admiralty in England and pointed out that "The admiral's authority was not excluded by attachment even to the main shore." In the same way Story, a century before Holmes, had pointed out in *De Lovio* v. *Boit,* (7 Fed. Cas. at 421, 431):

> And even Lord Coke admits, that maritime causes include causes arising upon the *sea shore* and in ports; for he declares "maritima est super littus or in portu maris." Harkeridge's case, 12 Coke, 129.
>
> * * * * *
>
> These pretensions, too, have been deliberately adopted by Sir H. Spelman, for he says (Spel. Reliq. Adm. Jur. 226) "The place absolutely subject to the jurisdiction of the admiralty is the sea,

---

[5] The French admiralty courts: "VI. Shall equally have jurisdiction of damages caused by seagoing vessels to fish traps constructed even in navigable rivers and those which the vessels receive from them; as well as to the roads employed for towing vessels coming from the sea, if there is no local right, title or interest to the contrary." The Admiralty courts furthermore: "VII. Shall also have jurisdiction of damages done to quais, dikes, jetties, palisades and other works erected against the violence of the sea, and shall see to it that ports and roadsteads are maintained clear and of proper depth."

> which seemeth to comprehend public rivers, fresh waters, creeks, and surrounded places whatsoever, within the ebbing and flowing of the sea at the highest water, the *shore or banks* adjoining, from all the first bridges seaward." (Emphasis supplied)

Thus Story quoted from one of the commissions granted by the Crown to the Admiral observing (*ibid.,* 436):

> It authorizes the admiralty "to hold conusance of . . . any cause, business or *injury* whatsoever had or *done* in or upon or through the seas, or public rivers or fresh waters, streams, havens, and places subject to overflowing whatsoever within the flowing and ebbing of the sea, *upon* the *shores or banks whatsoever adjoining to them or either of them* from any of the said first bridges whatsoever towards the sea throughout our kingdoms of England and Ireland, in our dominions aforesaid, . . ." (Emphasis supplied)

Indeed, Holdsworth, in referring to the nineteenth century English legislation [6] which provided that the admiralty courts should have jurisdiction of damage done by or to a ship, so as to include damage to shore structures, has said, "Modern legislation has restored to the court of Admiralty many of the powers, and much of the jurisdiction of which it had been deprived in the seventeenth century." [7]

The Vice Admiralty courts of the American colonies had similarly known no such restrictions as were applied, following Lord Coke, in the mother country but

---

[6] Admiralty Court Act, 1861, 24 Vict., c. 10, § 7, and earlier forms of the same provision from 1840 on. 3 & 4 Vict., c. 65; 9 & 10 Vict., c. 99; 17 & 18 Vict., c. 104. See also 31 & 32 Vict., c. 71.

[7] 1 Holdsworth, *History of English Law,* (3d ed., 1922) 558.

had instead been given the full historic admiralty jurisdiction over damages done by ship to shore. The extent of this colonial jurisdiction the Supreme Court in *Waring* v. *Clarke,* (1847) 5 How. 441, 457, expressly recognized as having been in contemplation by the framers of the Constitution. Its extension to include shore damage is shown by the commissions of the colonial judges. Thus the commission of Lord Cornbury, Governor of New York, Connecticut and New Jersey, as Vice-Admiral in 1701, including the following (4 Benedict, *Admiralty,* (6th ed., 1940) 410-411):

> And we do hereby remit and grant unto you, the aforesaid Edward, Lord Cornbury, our power and authority in and throughout our provinces and colonies, aforementioned, and the territories depending thereon, and maritime parts whatsoever of the same and thereto adjacent, and also throughout all and every the *sea shore,* public streams, ports, fresh water rivers, creeks, and arms, as well as of the sea, as of the rivers and *coasts* whatsoever of our said provinces and colonies, and the territories depending thereon, and maritime parts whatsoever of the same and thereto adjacent, as well within liberties and franchises, as without.
>
> . . . and generally, in all and singular all other causes, suits, crimes, offences, excesses, injuries, complaints, misdemeanors, or suspected misdemeanors, trespasses, regrating, forestalling and maritime businesses whatsoever, throughout the places aforesaid, within the maritime jurisdiction of our Vice-Admiralty of our provinces and colonies aforesaid, and the territories depending thereon by sea or water, *on the banks or shores of*

> *the same howsoever done,* committed, perpetrated, or happening. (Emphasis supplied.)[8]

The commission of 1762 to the Hon. Richard Morris, as judge of the vice-admiralty courts for the same colonies as the above, reads in part (4 Benedict, *Admiralty* 428-429):

> . . . hereby granting unto you the full power to take cognizance of, and proceed in all causes civil and maritime, . . . or which do anyways concern suits, trespasses, injuries, . . . or injury whatsoever, done or to be done as well in, upon, or by the sea, or public streams, or fresh waters, ports, rivers, creeks, and places overflowed whatsoever, within the ebbing and flowing of the sea, or high water mark, *as upon any of the shores, or banks adjoining* to them or either of them, . . . (Emphasis supplied.)

Moreover, judicial precedents aside, no tort can well be conceived of which is as matter of fact more maritime than damages inflected by a ship upon jetties, wharves and other aids to navigation and maritime commerce.[9] As Mr. Justice Holmes well observed in *The Blacksheath,* (1904) 195 U.S. 361, 365, it is abundantly plain that "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history." And since it cannot be supposed that the framers of the Constitution con-

---

[8] For the same wording as to the jurisdiction of the governor of the royal province of New Hampshire see *De Lovio* v. *Boit, supra,* fn. 46, p. 442.

[9] Thus the Supreme Court has declared that not merely jetties but wharves "are essential aids to navigation." *Atlee* v. *Packet Co.,* (1874) 21 Wall. 389, 393.

templated that the American admiralty law should remain immutable, Congress has the paramount power to fix and determine the jurisdiction within the factual limits of matters maritime just as it has power to alter, qualify and supplement admiralty law as experience and changing conditions may require. *The Thomas Barlum,* (1934) 293 U.S. 21, 43; *United States* v. *Flores,* (1933) 289 U.S. 137, 148. In the words of Holmes in *The Blackheath, supra* (pp. 364, 367), "it would be a strong thing to say that Congress has no constitutional power to give the admiralty here as broad a jurisdiction as it has in England or France" for "very little history is sufficient to justify the conclusion that the Constitution does not prohibit what convenience and reason demand." To the same effect see *American Bridge Co.* v. *The Gloria O,* (E.D. N.Y., 1951) 98 F. Supp. 71; *Mene Grande Oil Co.* v. *United States,* (S.D. N.Y., 1950) 94 F. Supp. 26; *All American Cables* v. *The Dieppe,* (S.D. N.Y., 1950) 93 F. Supp. 923; and compare *Strika* v. *Netherlands Ministry,* (2d Cir., 1951) 185 F. 2d 555, 558, with *Vega* v. *United States,* (S.D. N.Y., 1949) 86 F. Supp. 293, aff'd (2d Cir., 1951) 191 F. 2d 921. See also *The Nanking,* (N.D. Calif., 1923) 292 Fed. 642; *The Oconee,* (E.D. Va., 1921) 280 Fed. 927, 931-933.

Finally, if there could ever have been doubt on the point in the earlier days, it is now put at rest by Mr. Justice Hughes in *The Thomas Barlum,* (1934) 293 U.S. 21, 52, where he said:

> The authority of the Congress to enact legislation of this nature was not limited by previous

> decisions as the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters.

Thus, we submit that the constitutional power of Congress to provide for suit in admiralty under both the Rivers and Harbors Act, 1899, and the Admiralty Extension Act, 1948, cannot be questioned.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision below should be reversed and the cause remanded with instructions that the court below exercise in this case the admiralty jurisdiction granted it by 28 U.S.C. 1333.

HOLMES BALDRIDGE,
Assistant Attorney General,

HENRY L. HESS,
United States Attorney,

LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistants to the Attorney General,
Attorneys for the United States.

JANUARY 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 982743 608